IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.10.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

Civil Miscellaneous Appeal No.673 of 1999

Kanniappa Powerloom Factory
Rep. by K.L.Kanniappan Mudaliar, S/o. of Lakshmana Mudaliar
Residing at New Street, Door No.97 Pallipalayam,
Tiruchengode Taluk, Salem District .... Appellant/Petitioner

-Vs.-

The Regional Director
Employees State Insurance Corporation
143 Sterling Road, Chennai - 600 034. .... Respondent/Respondent

APPEAL under Section 82 of the ESI. Act 1948 against the order passed by the Principal District Judge, Salem in E.S.I.O.P.No.4 of 1994 dated 08.03.1999.

For Appellant : Mr. T.Sellapandian.

For Respondent : Mrs. Jayakumari.

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J U D G M E N T

Being aggrieved by the order dated 08.03.1999 passed by the E.S.I. Court (Principal District Judge), Salem in E.S.I.O.P.No.4 of 1994, the petitioner in the said O.P. has filed the above appeal.

2. The case of the appellant before the Court below is as follows:-

The petitioner was running Kanniappa Powerloom Factory employed only below 10 labourers at any time during the period from 01.07.1983 to 31.01.1985 and the appellant had employed only less than 9 employees during the period from 01.02.1985 to 31.03.1991 and hence the appellant's concern does not come under the definition of 'factory' and the provisions of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") are not attracted; but the respondent served a communication demanding Rs.8,180/- as contribution for the period from 01.07.1983 to 31.01.1985 and another sum of Rs.75,120/- for the period from 01.02.1985 to 31.03.1991 together with interest; the appellant is not liable to pay any amount; the appellant has

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leased out the factory and subsequently there was a partition between him and his two sons and the same was brought to the notice of the respondent and the labourers employed under the appellant have left the factory long ago.

3. The respondent has filed a counter affidavit containing the following contentions:-

The petition filed by the appellant is hit by the principles of res judicata in view of the dismissal of the petition filed by the appellant in E.S.I.O.P.No.11 of 1987. Since the appellant did not comply with the provisions of the Act, the order under Section 45-A of the Act was passed. A show cause notice was issued to the appellant and opportunity of hearing was also given to him before passing the order under Section 45-A. But the appellant neither replied nor appeared before the respondent in person. The application having been filed beyond the period of three years, the same is liable to be dismissed on the ground of limitation.

4. Before the court below the appellant was examined as P.W.1 and Exs.A-1 to A-6 were marked and on the side of the respondent R.W.1 and R.W.2 were examined and Exs.B-1 to B-8 were marked.

5. The lower court on a consideration of the oral and documentary evidence adduced in the case accepted the contention of the respondent that as per Section 1(6) of the Act, when a factory is once covered under the ESI Act it cannot be de-covered by any subsequent change of circumstance, such as change in total number of persons or in the nature of work done. Further the Court below rejected the application on the ground that E.S.I.O.P.No.11 of 1987 filed by the appellant had been dismissed and the order has become final and as such present application is not maintainable. Being aggrieved by that the above appeal has been filed. While admitting the above appeal, the following substantial questions of law have been framed:-

(i) The Learned Sessions Judge erred in dismissing the application filed under Section 75 of the E.S.I. Act.

(ii) The Learned Sessions Judge failed to see that the powerloom factory is not coming within the purview of the E.S.I. Act and the appellant never engaged any labourers attracting the coverage under the E.S.I. Act. Therefore demand notices issued by the respondent are liable to be set-aside.

6. Heard Mr. T.Sellapandian learned counsel for the appellant and Mrs.Jayakumari learned counsel for the respondent.

7. The learned counsel for the appellant submitted that the order of the Court below holding that as per Section 1(6) of the Act, when a factory once covered under the ESI Act it cannot de-covered by any subsequent change of circumstance, such as change in total number of persons or in the nature of work done, is not sustainable. The learned counsel for the appellant by referring

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to the definition of factory in Section 2(12) of the Act submitted that it is incumbent upon the respondent to show that in each year 10 or more persons were employed in an establishment and unless it is so shown the respondent is not entitled to rely upon Section 1 (6) of the Act.

8. Per contra the learned counsel for the respondent submitted that as per Section 1(6) of the Act, a factory or an establishment to which the Act applies shall continue to be governed by the Act notwithstanding that the number of persons employed therein at any time falls within the limit specified by or under the Act.

9. Section 1(6) of the Act reads as follows:-

> "A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power".

A reading of the above said provision clearly shows that once the factory is brought into the coverage under the Act and the code number is allotted, it will continue to be governed by the provisions of the Act and even if the number of persons employed cannot be falls under ten, the factory will not come out of the purview of the Act.

10. In the decision reported in 2001 (1) L.L.J. 336 (Employees' State Insurance Corporation, Bangalore Vs. Bangalore Engineer's Industry, Bangalore and another) a Learned Single Judge of the Karnataka High Court has observed as follows:-

> "After the amendment and the introduction of Section 1 (6) it is now beyond the scope of anybody to contend that an institution that has been covered will require a fresh order or fresh determination on each subsequent occasion when a breach has been observed or pointed out. The Trial Court would therefore have to brush aside any challenges that were hitherto permitted under this head insofar as if an institution has closed down or if within the framework of the Act the liability has legally ceased, then it is the duty of the employer to place this material before the Department and ensure that an appropriate order is passed and in the absence of this having been done, it shall not be open, particularly having regard to the provisions of Section 1(6) to question the basis of liability and to insist that fresh determination and fresh orders are necessary on each occasion".

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The above said decision of the Karnataka High Court supports the view taken by me. Therefore the contention of the learned counsel for the appellant is liable to be rejected.

11. In view of the reasons stated above, the substantial questions of law stand answered accordingly. I see no reason to interfere with the order passed by the Court below.

12. For the reasons stated above, the appeal fails and the same is dismissed. However, there will be no order as to costs.

srk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

The Principal District Judge,
Salem.

1 cc to Mrs.S.Jayakumari, Advocate, SR.50613
1 cc to Mr.S.Mani, Advocate, SR.50599

akm (co)

dv/20.11.06

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